

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
WATSON ASPHALT PAVING COMPANY, )  
 )  
Appellant, )  
 )  
v. )  
 )  
PUGET SOUND AIR POLLUTION )  
CONTROL AGENCY, )  
 )  
Respondent. )

PCHB No. 86-140

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

THIS MATTER, the appeal of a \$400 civil penalty for excessive opacity in violation of respondent Agency's Regulation I, Section 9.03(b) and WAC 173-400-040 (1), came on for hearing before the Pollution Control Hearing Board: Lawrence J. Faulk, Chairman and presiding, and Wick Dufford, member, on October 17, 1986, at the Board's offices in Lacey, Washington. The respondent Agency elected a formal hearing, pursuant to RCW 43.21B.230.

1 Appellant company was represented by its Attorney, Thomas H.  
2 Wolfendale. Respondent appeared by its Attorney, Keith D. McGoffin.  
3 Court reporters Gene Barker & Associates recorded the proceedings.

4 Witnesses were sworn and testified. Exhibits were examined.  
5 Argument was made. From the testimony, evidence and contentions of  
6 the parties, the Board makes these

7 FINDINGS OF FACT

8 I

9 Respondent Puget Sound Air Pollution Control Agency (PSAPCA) is a  
10 municipal corporation with responsibility for carrying out a program  
11 of air pollution prevention and control under the Washington Clean Air  
12 Act. Pursuant to RCW 43.21B.260, PSAPCA has filed with the Board a  
13 certified copy of its Regulation I and all amendments thereto, which  
14 are noticed.

15 II

16 Appellant Watson Asphalt Paving Company operates an asphalt batch  
17 plant in Redmond, Washington. The batch plant exhausts from a  
18 baghouse, installed for pollution control purposes, which contains  
19 approximately 960 individual bags. The baghouse was purchased in  
20 1970, forming part of a different asphalt plant until its  
21 incorporation into the present day asphalt plant in 1977.

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III

PSAPCA has developed standards for the opacity of emissions, including those from asphalt batch plants, and employs inspectors to monitor the opacity of emissions from industrial sources.

PSAPCA's regulation forbids emissions equal to or greater than 20% opacity for a period, or periods, aggregating more than three minutes in one hour.

IV

On June 12, 1986, at 12:45 p.m. a PSAPCA inspector was traveling eastbound on SR 520. At approximately 165th Avenue N.E. and SR 520 the inspector observed a large brown plume of dust or smoke, about three miles distant, rising 300 to 500 yards in the air, coming from the area where Watson Asphalt is located. He noted the time and location and, then, proceeded on other business, planning to check on Watson Asphalt as soon as he had time.

Later, at approximately 1:35 P.M., the inspector arrived at Watson Asphalt. He testified that he then observed a plume rising vertically from the baghouse stack. The weather was clear and hot and the wind was calm. The plume contrasted sharply with the background. At 1:45 he took two photographs which clearly show the plume.

1 Immediately thereafter, at 1:46 he began taking opacity readings,  
2 contemporaneously recording his observations on a standard form  
3 Visible Emissions Work Sheet every fifteen seconds. The sun was  
4 almost directly behind him. He was stationed approximately 100 yards  
5 south of the emitting source.

6 He continued his readings for eight full minutes. He testified  
7 that what he saw was, in his opinion, a dust plume from the baghouse.  
8 For the first 2 3/4 minutes he judged the emissions to be at 40%  
9 opacity. Then there was a modest increase, peaking at 60% opacity at  
10 the end of the fourth minute. Thereafter the readings showed a  
11 gradual decline, levelling off at 40% opacity after 2 3/4 minutes and  
12 staying at that level for 3/4 of a minute.

13 In total, the readings exceeded 20% opacity for seven consecutive  
14 minutes. In the eighth minute the opacity began at 15% and trailed  
15 off to zero by the last reading. After that the inspector observed no  
16 more emissions.

17 v

18 PSAPCA's inspector has received training and retraining in plume  
19 evaluation. Four times he has been certified as qualified smoke  
20 reader, after taking an examination comparing his judgments of plume  
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1 opacities with objective measurements. His last recertification test  
2 before the events in question occurred on April 18, 1986. On that test  
3 his readings deviated from the measured readings an average of between  
4 2 - 5.6%. None of his readings deviated as much as 15%.

5 VI

6 Watson's general manager was in his office at the plant site on  
7 the afternoon on June 12, 1986. His window faces the asphalt plant  
8 and from his office the baghouse stack emissions can plainly be seen.

9 Sometime, shortly after 1:30 p.m. he observed what he described as  
10 "puffs of dust" from the baghouse. Fearing problems, he contacted the  
11 plant operator and directed him to shut down the plant. The plant  
12 operator advised that he had already started to do so.

13 Watson's routinely maintains a time/temperature graph to record  
14 asphalt plant temperatures. This graph for June 12, 1986, shows that  
15 the temperature in the plant began to decline steeply sometime around  
16 1:40 p.m. and that this decline continued until after 2:00 p.m. This  
17 indicates that the plant was in a shutdown mode, with the burner  
18 turned off, during the period of the PSAPCA's inspector's observations.

19 The plant operator provided testimony that the shutdown operation  
20 takes from 15 to 20 minutes. During this time bursts of air are run  
21 through the baghouse in order to clean it out. This process always  
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1 produces "a small plume of dust for a minute or two," he said. But he  
2 did not provide any testimony as to when and for what duration air was  
3 run through the baghouse in the instant case.

#### 4 VII

5 Neither the general manager nor the plant operator was aware that  
6 PSAPCA's inspector was on the scene taking readings during the eight  
7 minutes (1:46 - 1:54 p.m.) he did so. Neither the general manager nor  
8 the plant operator testified to having observed the plume during the  
9 time the opacity readings were taken.

10 The plant manager asserted that insufficient air was going through  
11 the baghouse during shutdown to produce the opacity readings PSAPCA's  
12 inspector took. This assertion, however, was based on the manager's  
13 assumption, not on his personal knowledge of how the equipment was  
14 being operated at the time in question.

15 The plant manager also theorized that the inspector might have  
16 been looking at a steam plume from another source.

#### 17 VIII

18 After taking his readings, PSAPCA's inspector encountered the  
19 plant manager and told him about the readings he had taken. The  
20 inspector did not issue a Notice of Violation, but said that Watson's  
21 might be getting something in the mail.  
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1 The inspector did not inquire as to whether some malfunction had  
2 occurred. When the plant manager asked if he could restart the plant  
3 so as to verify if there was a problem, the inspector advised he did  
4 not have time for that and drove away.

5 IX

6 As a result of the events of June 12, 1986, Watson's personnel  
7 suspected there might be a problem with some of bags in the baghouse.  
8 On Saturday, June 14, 1986, the company's maintenance crew conducted a  
9 tracer test, blowing fluorescent dust through the bags and looking for  
10 leaks by use of a black light. Eight bags discovered to have holes  
11 were replaced. Two other bags with holes were plugged to prevent air  
12 filled with particles from passing through and some thirty to forty  
13 bags were resealed to prevent any leakage of dust.

14 X

15 Considering all the evidence, we are convinced that PSAPCA's  
16 inspector did, in fact, see what he said he saw at the times he took  
17 his readings. We find that for seven consecutive minutes on June 12,  
18 1986, emissions of dust from Watson's asphalt batch plant baghouse  
19 exceeded 20% opacity.

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XI

In a settlement of two earlier contested cases relating to air pollution control matters (approved by this Board on January 31, 1986), the company agreed to meet a 10% opacity standard until July 1, 1986. In return for Watson's submitting to this strict standard, the agency agreed to a specific enforcement procedure, as follows:

It is understood and agreed between the parties that if an inspector from Respondent Agency observes an emission that is alleged to violate the 10% opacity standard, the inspector shall after the observation immediately report same to the operator of the batch plant so that Appellant can see and substantiate said emission.

The idea was for Watson's to train an employee to be a certified smoke reader and for this employee to observe and verify opacity problems detected by PSAPCA.

XII

Watson Asphalt has prepared and filed with PSAPCA an operation and maintenance plan for the control of emissions from the batch plant and baghouse. The company is implementing the plan through an active ongoing preventive maintenance and upkeep program. Bags are replaced or plugged as problems are detected. Tracer tests are common. Annually all bags are taken out and looked over. The baghouse is inspected at least monthly. In practice, visits to the baghouse are



1 more frequent. Maintenance records show fifteen separate entries  
2 related to inspection, repair, or cleaning in the baghouse in the four  
3 month period between April 1 and August 1, 1986.

4 The company continually monitors air pressure in the baghouse  
5 during operations. If a large number of bags have burst, there should  
6 be an anomolous pressure reading. On June 12, 1986, the pressure  
7 reading was normal.

8 We find that the failure of those bags which were replaced,  
9 plugged, or sealed on June 14, 1986, was not the result of inattention  
10 to proper maintenance. The problem was an unanticipated, unintended,  
11 non-negligent upset condition.

12 XIII

13 On Monday, June 16, 1986, PSAPCA's inspector returned to Watson's  
14 for the purpose of reviewing the company's maintenance records. He  
15 did so and, while on site, observed the plant while in operation.  
16 There were no emission problems.

17 XIV

18 On June 16, 1986, Notice of Violation No. 021349 was mailed to the  
19 company's offices. Subsequently, on July 9, 1986 the agency issued  
20 Notice of Civil Penalty No. 6469, asserting a violation of Section  
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1 9.03 (b) of PSAPCA Regulation I and WAC 173-400-040 (1), and assessing  
2 a fine of \$400, for emissions of 40 - 60% opacity for seven minutes on  
3 June 12, 1986.

4 On August 8, 1986 the appellant feeling aggrieved by this decision  
5 filed its appeal of this notice and order with this Board.

6 XV

7 Watson has been cited for opacity violations from its batch plant  
8 baghouse on three prior occasions: August 24, 1983; September 25,  
9 1984; and July 11, 1985. In the first two instances the company  
10 simply paid the penalty. In the third case, an appeal was filed and  
11 ultimately compromised without acknowledgement of culpability but with  
12 the agreement mentioned above to meet a stricter standard (10%  
13 opacity) for six months.

14 XVI

15 The total record of agency surveillance of this source is one of  
16 unusual vigilance. The total record of company response is one of  
17 continuing effort to maintain compliance. The company is striving for  
18 a reputation as an industry leader in meeting air pollution  
19 requirements. Its pollution control equipment is technologically  
20 advanced and of high quality.

XVII

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the issues and the parties. Chapters 43.21B RCW, 70.94 RCW.

II

PSAPCA Regulation I, Section 9.03(b) prohibits opacity equal to or exceeding 20% for a period or periods aggregating three minutes in any one hour. WAC 173-400 -040(1) is to the same effect. We conclude that these standards were exceeded by emissions from appellant's plant on June 12, 1986.

III

Appellant's challenges the validity of the opacity standard as applied in this case. No appellate decision has established binding precedent on this issue.

IV

Appellant's argument is that the 20% opacity standard exceeds the regulatory authority of the enabling statute, the Washington Clean

1 Air Act, Chapter 70.94 RCW.

2 This argument seeks to apply to opacity limits the reasoning of  
3 Kaiser Aluminum v. PCHB, 33 Wn. App.352, 654 P.2d 723 (1982). The  
4 contention is that no regulation may proscribe emissions more  
5 restrictively than the limit verbalized in the statutory definition of  
6 "air pollution" contained in RCW 70.94.030(2). This definition  
7 describes "air pollution" in terms of harm or the creation of a  
8 harmful potential.

9 The assertion that any regulatory limitation must describe harmful  
10 or potentially harmful contamination arises from RCW 70.94.040 which  
11 makes causing "air pollution" unlawful. The underlying premise is  
12 that this single statutory section is the sole substantive provision  
13 of the law, against which all regulations must be measured.

14 V

15 We disagree and find the regulation struck down in Kaiser  
16 Aluminum distinguishable from the type of regulation attacked here.

17 We have in the past discussed this matter at length, most recently  
18 in U.S. Oil and Refining Company v. PSAPCA, PCHB Nos. 85-163 and  
19 85-214 (January 30, 1986). We adhere to our approach in U.S. Oil and  
20 adopt its reasoning in the instant case.

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1 In brief, our conclusions are:

2 1) Rulemaking authority added to the law subsequent to the  
3 adoption of RCW 70.94.040 allows the adoption of "emission standards",  
4 achievable with existing technology by individual sources. RCW  
5 70.94.331,380,152.

6 2) Such "emission standards" are necessarily more restrictive than  
7 the definition of "air pollution", which describes a condition sought  
8 to be avoided in the general environment by the aggregate of releases  
9 from multiple sources. If standards applied to one source can be no  
10 stricter than the definition of pollution itself, a single industrial  
11 operation could preclude all others from locating in its vicinity and  
12 effectively stifle industrial development.

13 3) This result would be contrary to the purposes of the Washington  
14 Clean Air Act which are to promote both clean air and economic  
15 health. RCW 70.94.011. It would also be contrary to that facet of  
16 the state's policy which calls for compliance within the Federal Clean  
17 Air Act.

18 4) We believe that the opacity limitations in question are  
19 "emission standards" and that, as such, they are reasonably consistent  
20 with the statute they purport to implement and, therefore, valid.  
21 Weyerhaeuser Co. v. Department of Ecology, 86Wn.2d310,545P.2d5(1976).

1 VI

2 We note that the Court of Appeals for Division I has inferentially  
3 sustained the validity of opacity limitations. Chemithon Corporation  
4 v. PSAPCA, 31 Wn. App. 276, 640 P.2d 1085 (1982). Moreover, we think  
5 the Legislature did likewise in 1984 when it expressly amended RCW  
6 70.94.431, the civil penalty section, to set a separate ceiling "for  
7 the violation of any opacity standard." Section 2, Chapter 255, Laws  
8 of 1984.

9 VII

10 Appellant asserts that the enforcement action in this case  
11 violates the purpose and intent of breakdown or shutdown provisions.  
12 Again we disagree.

13 RCW 70.94.431 authorizes the imposition of fines on a strict  
14 liability basis. Thus, it is irrelevant to liability for such fines  
15 that any violation resulted unintentionally from an unanticipated  
16 upset or breakdown. Section 9.17 of PSAPCA's Regulation is consistent  
17 with this approach to civil penalties. It merely provides a  
18 notification requirement in the event of an unplanned upset or  
19 breakdown condition. It does not provide that such events are an  
20 excuse for emissions which violate standards.

1 That certain federal regulations may be to the contrary, does not  
2 in any way invalidate the strict liability scheme of the Washington  
3 statute, and of PSAPCA's rules. Greater state and local stringency is  
4 specifically provided for in Section 116 of the Federal Clean Air Act.

5 VIII

6 However, the principal aim of civil penalties is to influence  
7 behavior - to deter violations and to secure compliance both in the  
8 specific instance and generally.

9 On this record the appellant appears to be making considerably  
10 more than a token effort at compliance. We believe the company is  
11 sincerely committed to meeting the standards. In addition, we think  
12 it is highly regrettable that the agency, having agreed to provide the  
13 company with an opportunity to verify violations, chose to disregard  
14 their promise in this case. In light of all the facts and  
15 circumstances we conclude that the following order is appropriate.

16 IX

17 Any Findings of Fact which is deemed a Conclusion of Law is hereby  
18 adopted as such.

19 From these Conclusions of Law the Board enters this  
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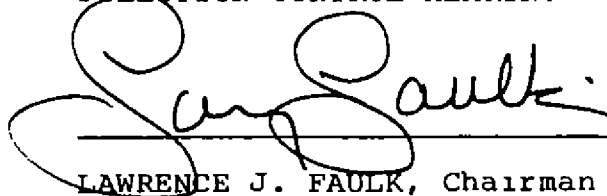
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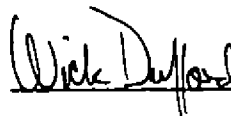
ORDER

Notice and Order of Civil Penalty No. 6469 issued by PAPCA to Watson Asphalt Paving Company is affirmed, provided however that the monetary fine is suspended on condition that appellant not violate respondent's opacity standard for a period of one year from the date this Order is entered.

DONE this 27th day of February, 1987.

POLLUTION CONTROL HEARINGS BOARD

 2/27/87  
LAWRENCE J. FAULK, Chairman



WICK DUFFORD, Member

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